IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2518 OF 2004

EKTA SATISH CHOUDHARY, age 28)
an Indian Inhabitant, residing)
at 1st floor, Arunodaya,)
Bapubhai Vashi Road, Vile-Parel)
(West), Mumbai.)..Petitioner
(daughter of detenu)

Versus

1. The State of Maharashtra)
through the Secretary to the)
Govt. of Maharashtra, Home)
Department, Mantralaya,)
Mumbai 400 032.)

2. Neela Satyanarayana,)
The Principal Secretary to)
the Governmetn of Maharashtra)
Home Department (Appeals)
And Security), and Detainig)
Authority, Mantralaya,)
Mumbai - 400 032.)

3. The Superintendent of Prison)
The Mumbai Central Prison)
Arthur Road, Mumbai.)

4. The Superintendent of Prison)
Nasik Road, Central Prison)
Nasik.)...Respondents

Shri Shirish Gupte, Senior Advocate with Adv.Maqsood Khan and Adv. Yogesh Rohira for Petitioner

Shri D.S.Mhaispurkar, APP for State.

CORAM : R.M.S.KHANDEPARKAR &
P.V.KAKADE, JJ.
DATE : 17TH JANUARY, 2005

ORAL JUDGMENT : (Per Khandeparkar, J.)

1. Heard. Perused the records.

2. By the present Petition Petitioner challenges the Order of Detention dated 8th November, 2004 issued by the Respondent No.2 against the detenu - Shri Satish Khetaram Choudhary, the father of the Petitioner herein, under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called as "COFEPOSA ACT"). The challenge is two fold, firstly that the order of detention discloses non-application of mind in asmuch as that order of detention speaks of necessity for detention of the detenu to prevent him in future from abetting smuggling of goods whereas the grounds in support of the Order allege involvement of the detenu in smuggling of goods and the said discrepancy denies fair

opportunity to the detenu to make effective representation against the order of detention and secondly that the subjective satisfaction of the Detaining Authority is vitiated on account of failure to consider the vital and material document i.e. Order dated 3.11.2004 passed by this Court whereby the passport of the detenu was directed to be returned and the detenu was permitted to travel abroad.

3. While challenging the impugned order of detention the learned counsel appearing for the Petitioner, drawing attention on the grounds in support of the impugned order, has submitted that the plain reading of those grounds revealed the allegation of participation of detenu in the conspiracy hatched for the export of low quality RMGs from various firms controlled by him by misdeclaring the value of the export goods, arrangement for customs clearance of the said goods at Dubai, their delivery, storage and subsequent disposal through Mr.Pankaj Jhunjhunwala and Mr. Navin Choudnary, who were said to have been his paid employees, besides providing the funds and arrangement for remittances against the exports as well as the allegation of the active involvement and financial support to carry out

the impugned export of cheap quality RMGs under Duty drawback and DEPB scheme from firms controlled by Mr. Subhash Choudhary, by resorting to gross overvaluation with the sole intention of making fraudulent exports of RMGs so as to defraud the Government Exchequer by claiming duty drawback and DEPB credit to the tune of Rs.6.90 crores and Rs.4.55 crores respectively. It is further submission that the law on the point of difference between the involvement in smuggling and involvement in the abetment of smuggling goods is well settled by number of decisions including the decision of this Court in the matter of **Prithvi Sovern Kuntal vs. State of Maharashtra & Ors. - 2002 (Cri. Supp.) Bom. C.R. 692**. The impugned Order which seeks to clamp down the preventive detention order for preventing the detenu from abetting smuggling is in direct variance with the grounds which allege the acts of direct involvement in financing and carrying out the activity of smuggling, and therefore, it apparently discloses total non-application of mind, which warrants quashing of the said order. He also submitted that on account of variance in the purpose for which the detention order is passed and the grounds clearly discloses that the detenu was prevented from making effective representation in

exercise of his rights assured under Article 22(5) of the Constitution of India and in that regard attention is drawn to the decision of this Court in the case of **Alka Subhash Gadia vs. Addl. Secretary, Govt. of India and Ors. - 1991 Mh.L.J. 1125**, which required Detaining Authority not only to communicate the detention order but also the grounds for detention so as to enable him to make an effective representation against the order of detention. The learned advocate for Respondents while referring to the grounds and further to the affidavit in reply filed by the Detaining Authority has submitted that the satisfaction arrived at by the Detaining Authority for issuance of the impugned Order is based on the allegations which do not relate to the participation of the detenu in abetment of smuggling of the goods and even the conclusion arrived in the grounds in support of the Order clearly reveal the same and the same is further reiterated in the affidavit in reply.

4. Undisputedly the Order of detention has been passed stating that -

> ".....satisfied with respect to the

person known as Shri Satish Khetaram Choudhary (age 54 years) residing at First floor, Arunodaya, Bapubhai Vashi road, vile Parle (West), Mumbai, that with a view to preventing him in future from abetting smuggling of the goods, it is necessary to make the further orders."

At the same time the conclusion which are arrived at to justify the detention of the detenu and which have been recorded in para 71 onwards of the grounds supporting the said order clearly disclose the allegations of actual participation by the detenu in the acts of smuggling. They included the acts of a massive export fraud by way of gross overvaluation of export goods in order to avail undue export benefits with one Mr. Subhash Choudhary as being the main brain behind the exports fraud and further by active co-operation and participation hatched the entire conspiracy to export low quality RMGs from various firms controlled by him by misdeclaring the value of the export goods. Mr.Subhash Choudhary effected such exports with total declared FOB value of around Rs.93 crores, without any purchase orders/export contracts from any of the overseas firms

and they were affected on the verbal instructions given by the detenu and Mr. Navin Choudhary to Mr.Subhash Choudhary. Apart from these exports with total declared FOB value of around Rs.8.80 crores, financed by the detenu were also effected from a firm M/s.Yokuchem (Pvt.) Ltd. The detenu was the co-conspirator in the subject fraudulent exports, was well aware of the said export fraud and played very vital role in its execution. He decided upon the goods to be exported to Dubai from the firms, based on the demands perceived by him from firms like M/s.Mohd. Essa Al Marri Trading Co. (L.L.C.) and Dubai wholesale market. He also arranged for customs clearance of goods at Dubai, their delivery, storage and subsequent disposal through Mr. Pankaj Jhunjhunwala and Mr.Navin Choudhary, who were his paid employees. The detenu also financed the said exports and arranged for remittances against the said exports. He discounted majority of the export bills of the concerned firms and transferred huge funds to the concerned export firms by utilising the huge credit facility of Rs.15.50 crores given to his firms by his bankers. He also provided advances through his firms to the said export firms. He arranged discounting of cheques, issued by the firms of Mr. Subhash Choudhary

against the funds/advances, through persons like Mr. Sheetal Jain and Mr. Pradeep Dhelia, thereby generating huge cash. He transferred the said cash to Dubai by converting it into foreign exchange and arranged its delivery to Mr. Pankaj Jhunjhunwala through persons like Mr. Salam, Mr. Paicher and Mr. Zaida. He instructed Mr.Pankaj Jhunjhunwala to deposit the said cash in Dirhams in the bank a/cs of Dubai based companies viz. M/s. Mohd. Essa Al Marri Trading Co. (L.L.C.), M/s.Reem Al Maha Trading Estd., M/s. Babil Textiles Trading Est. and M/s. Al Sambook Trading at Bank of Baroda, Deira, Dubai branch. He routed the same funds back to India, through banking channels as remittances against goods exported by gross overvaluation by the firms of Mr. Subhash Choudhary. In case export remittances ware to be sent in advance, he instructed Mr.Pankaj Jhunjhunwala to send the said remittances through various Money exchange Houses in Dubai by using the cash in Dirhams arranged by him. Thus Mr. Subhash Choudhary with active involvement and financial participation of the detenu carried out the export to defraud Government exchequer by claiming duty drawback and DEPB Credit to the tune of around Rs.0.40 lakhs and 0.70 lakhs respectively. The grounds

specifically records that :

> "From the prevailing circumstances, it is apparent that you knowingly been involved in smuggling of goods. I am satisfied that unless detained you are likely to continue to engage in aforesaid prejudicial activities in future also, and therefore, it is necessary to detain you under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with a view to preventing you in future from abetting smuggling of the goods."

5. Plain reading of the impugned order and the grounds and the conclusion arrived in the grounds in support of the detention order apparently discloses that facts which are referred to are clearly related to the acts of smuggling and not the acts of abetment of smuggling as such. In fact, the Detaining Authority itself has held "It is apparent that you have knowingly been involved in smuggling of goods" (para 75), apparently therefore, the detaining authority had clearly analysed the materials on record as revealing the detenu’s involvement in the activities of smuggling

of goods and not in the acts of abetment of the activity of smuggling of goods.

6. The Division Bench of this Court in the case of Prithvi Sovern Kuntal (supra) after taking support of various decisions including the decision of the Apex Court has held that -

> "there is marked distinction between charging a person of indulging in abetting the smuggling of goods and that of engaging in the activity of smuggling of goods. In criminal jurisprudence also it is well settled that abetment of an offence is not a minor offence and the ingredients that must be proved for the abetment of an offence are quite different from those required to establish the substantive offence. It is also well settled that the charge of substantive offence as such gives no intimation of a trial to be held for abetment."

It has been further held therein that -

> "the variance in the order referring the reason

> for detention of preventing the detenu in future from abetting the smuggling of goods, would clearly suffer from the vice of non-application of mind of the Detaining Authority, for both the situations are exclusive and not over lapping at all. As a necessary corollary such an order cannot stand the test of judicial scrutiny."

7. It was sought to be contended that some of the ingredients of the offence of smuggling and the offence of abetting of the smuggling may overlapping. However, unless the Detaining Authority in the grounds in support of the detention order makes out a case to that effect and based on such finding, the order to prevent the abetment of smuggling in future is passed, mere arguments that there could be overlapping of the ingredients of both the offences that by itself would not be of any help to the Respondents to justify the impugned order, nor it would disclose a proper application of mind by the detaining authority to the materials placed before it to justify passing of the order of the nature passed by it. Once the detaining authority arrives at conclusion about the involvement of

the detenu in the smuggling of goods, whereas the detention order is passed for avoiding the involvement of the detenu in abetment of the smuggling of the goods, it clearly discloses the non application of mind by the detaining authority to the materials on record while passing the order of detention. The Petitioner therefore is justified in contending that the impugned order discloses non application of mind by the detaining authority while passing the order which would justify quashing of the impugned order.

8. It is also to be noted that on account of such variance between the order and the grounds in support thereto, as rightly submitted by the advocate for the Petitioner, the Petitioner is handicapped in making any effective representation against his detention to the Detaining Authority. The Division Bench of this Court in Alka Subhash case (supra) had held that -

> "Recording of subjective satisfaction of the detaining authority to the effect that in view of the circumstances cited in the remaining grounds the detaining authority is satisfied

> that the detenu was likely to indulge in future in similar prejudicial activities is a ground in itself, which is necessarily to be communicated to the detenu so that he may be in a position to effectively represent against the comprehensive grounds of detention and merely communicating to the detenu the order of detention itself is not sufficient."

9. Once it is apparent that the order is stated to have been passed on satisfaction about the need of such order to avoid involvement of the detenu in future in the activities of the nature of abetment of the smuggling, whereas the grounds in support thereof do not disclose any material to justify such a satisfaction, and on the contrary the grounds disclose the material to arrive at the conclusion about the involvement of the detenu in the smuggling activities, the alleged satisfaction will stand vitiated and consequently the order allegedly based on such satisfaction also stand vitiated. Besides, such a variance in the grounds and the detention order would certainly prejudice the rights of the detenu in making effective representation under Article 22(5) of the Constitution of India and on that

ground also the impugned order would stand vitiated and therefore liable to be quashed.

10. Before parting with the matter, it pains to note that it is surprising that inspite of the law being well settled on the point involved in the matter and there being a clear judgment passed by this Court to which the State Government was a party wherein the differentiation between the act of smuggling and the act of abetment of smuggling was clarified and on the similar issue the detention order passed as long back as in November, 2000 was quashed and the decision was reported in Law Journal 2002, and yet the detaining authority has shown no hesitation for carelessness for repetition of the same error while passing the impugned order in the year 2004. One fails to understand as to how the detaining authority can commit such an error, if at all it can be called as an error, when the law being well settled on the point in issue. It would be appropriate for the concerned authorities to take note of the carelessness on the part of the concerned officials and to do the needful in the matter. We refrain ourselves from giving any direction as such in that regard, hoping that the concerned authority of the

respondent No.1 will do the needful.

11. For the reasons stated above the Petition is allowed. The impugned order dated 8th November, 2004 is hereby quashed and set aside and the detenu- Satish Khetaram Choudhary is directed to be released forthwith, unless required in any other matter.

(R.M.S.Khandeparkar, J.)

(P.V.Karate, J.)